

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In re Matter of	)
	)
TRANS VIDEO COMMUNICATIONS, INC.	)
	)
Licensee of Educational Broadband Service	)
Stations KNZ70 and KVS31, New York, New	)
York	)

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 24, 2007**

**Released: January 25, 2007**

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. We have before us a Petition to Modify the interrelated Educational Broadband Services (EBS) authorizations of Trans Video Communications, Inc. (TVC) for its B and F group facilities in New York, New York, filed by NY3G Partnership (NY3G) on January 10, 2005 (Petition).<sup>1</sup> For the reasons discussed below, we deny NY3G's Petition.

**II. BACKGROUND**

2. TVC received authorization to operate on EBS B group channels in 1964, but due to geographical obstructions, operations on the B group channels could only reach 90 school receive sites.<sup>2</sup> In 1996, TVC applied for four F group channels to serve additional schools.<sup>3</sup> In 1968, TVC obtained licenses for EBS Stations KNZ70 and KVS31 authorizing it to operate on the F Group EBS channels in Queens, New York.<sup>4</sup> According to TVC, Station KNZ70 allowed it to serve 83 additional schools in Queens, and Station KVS31 allowed TVC to serve 23 additional schools in Brooklyn and Queens.<sup>5</sup>

3. In 1983, the Commission re-designated the E and F Group EBS channels from the EBS service to Broadband Radio Service (BRS) usage in an effort to spur the development of BRS.<sup>6</sup> As part

<sup>1</sup> NY3G Partnership Petition to Modify Licenses (filed Jan. 10, 2005) (Petition).

<sup>2</sup> Trans Video Communications, Inc. Opposition to Petition to Modify Licenses (filed Jan. 25, 2005) (TVC Opposition) at 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, GN Docket No. 80-112, CC Docket No. 80-116, *Report and Order*,

of its decision, the Commission grandfathered EBS licensees operating on the E Group and F Group channels, but only offered grandfathered EBS stations protection from harmful co-channel and adjacent channel interference from BRS stations to the extent of their service that was either in operation, or in the application stage as of May 26, 1983. Thus, grandfathered licensees would not generally be permitted to change transmitter location or antenna height, or to change transmission power of these stations. In addition, any new receive stations added after May 26, 1983 would not be protected against interference from BRS transmissions unless the grandfathered licensee obtained a waiver of Section 74.902(c) of the Commission's Rules.<sup>7</sup> Accordingly, all facets of grandfathered EBS operations were frozen as of May 26, 1983, but the Commission grandfathered existing operations (including TVC's operations on Stations KNZ70 and KVS31).<sup>8</sup>

4. In 1985, NY3G (formerly Grand MDS Alliance New York F/P) was chosen as the tentative BRS selectee of the F group channels in New York City.<sup>9</sup> On May 6, 1997, NY3G was granted a BRS license to operate Station WMY467 on those channels.<sup>10</sup> NY3G asserts that because the service areas for the F group channels of TVC and NY3G are almost completely overlapping, NY3G cannot use its F group channels to establish a meaningful broadband service.<sup>11</sup>

5. After NY3G was chosen as the tentative selectee of the F group channels in New York, NY3G asserts that it entered into negotiations with TVC to address potential interference concerns and facilitate deployment of NY3G's service.<sup>12</sup> According to NY3G, the parties reached an agreement whereby TVC would cease transmitting on the F group channels.<sup>13</sup> As a material component of that agreement, TVC sought FCC authority to relocate its main EBS facility operating on the B group channels to the Empire State Building.<sup>14</sup> Another material component of the alleged agreement was that

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94 FCC 2d 1203, 1228-29 ¶¶ 61-63 (1983) (*E and F Group Reallocation Order*). On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing MDS and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004) (*MDS/ITFS R&O & FNPRM*). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. Because the new rules have taken effect, we will refer to the services by their new names.

<sup>7</sup> *E and F Group Reallocation Order*.

<sup>8</sup> See In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, GN Docket No. 80-112, CC Docket No. 80-116, *Memorandum Opinion and Order on Reconsideration*, 98 FCC 2d 129, 132-33 ¶ 12 (1983) (*E and F Group Reallocation Reconsideration Order*). See also 47 C.F.R. § 74.902(c).

<sup>9</sup> File No. BPMD-8305455.

<sup>10</sup> See Mass Media Bureau Multipoint Distribution Service Applications, Report No. D-925-A, *Public Notice* (May 7, 1997).

<sup>11</sup> Petition at 9.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

NY3G would file an application proposing to operate on the F group channels on the Empire State Building using its own facilities.<sup>15</sup>

6. In the application where TVC sought authority to operate on the Empire State Building, TVC stated that grant of such application would improve spectrum utilization by eliminating its need to continue operating on the F group channels freeing up the spectrum for use by the BRS licensee.<sup>16</sup> NY3G asserts that TVC eventually changed its position on relinquishing use of the F channels and refused to renegotiate the terms of the agreement with NY3G.<sup>17</sup> NY3G filed Informal Comments in 1996, urging the Commission to grant TVC's relocation application on the condition that it relinquish its F group authorizations.<sup>18</sup> In 2003, the former Public Safety and Private Wireless Division granted TVC authority to operate on the Empire State Building but did not require it to relinquish its use of the F channels, nor did it place any conditions on the authorization.<sup>19</sup> NY3G alleges if TVC relocates its EBS facility to the Empire State Building and operates digitally, it will be able to serve all the receive sites of its F group transmitter without operating on the F channels.<sup>20</sup>

7. TVC asserts that subsequent to the 1983 Order, it entered into negotiations with Ultravision, NY3G's predecessor, regarding the use of the F group channels, and the parties reached an agreement on August 6, 1986.<sup>21</sup> According to TVC, the agreement provided for a series of modifications to TVC's ongoing operations that would have permitted Ultravision to commence full time operation on the F group channels, but Ultravision defaulted on its obligations pursuant to the agreement, including obligations to make payments.<sup>22</sup> TVC asserts that it notified Ultravision of its intention to terminate the agreement due to the continuing default in September 1994.<sup>23</sup> When Ultravision sought to renegotiate the agreement rather than to comply with its obligations, TVC declined to renegotiate the agreement and instead entered into a new lease agreement with a wireless cable company for use of TVC's excess capacity.<sup>24</sup>

8. NY3G asserts that prior to filing the instant Petition, it met with TVC on three occasions to discuss use of the F group channels, yet the parties could not reach an agreement.<sup>25</sup> NY3G asserts that TVC's continuing use of the F group channels has constrained its plans to use the F group channels to deploy affordable broadband services to historically underserved consumers.<sup>26</sup>

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<sup>15</sup> *Id.* at 4-6.

<sup>16</sup> *Id.* at Attachment C.

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.* at 7.

<sup>19</sup> Letter from D'wana R. Terry, Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau to Bruce D. Jacobs, Esq., 18 FCC Rcd 12314 (WTB PS&PWD 2003).

<sup>20</sup> Petition at 11-12.

<sup>21</sup> TVC Opposition at 3-4.

<sup>22</sup> TVC Opposition at 3-4.

<sup>23</sup> TVC Opposition at 4.

<sup>24</sup> TVC Opposition at 4.

<sup>25</sup> Petition at 8-9.

<sup>26</sup> *Id.* at 9.

9. NY3G also argues that TVC's use of Stations KNZ31 and KNZ70 violates the four-channel rule, which, at the time the Petition was filed, limited EBS licensees to four channels in any one area of operation.<sup>27</sup> NY3G alleges that at the time TVC originally filed for the F group channels, TVC did not request, and the Commission did not grant, a waiver of the four-channel rule.<sup>28</sup> NY3G also alleges that TVC's use of the F group channels is inefficient and that the public interest would be served by relocating TVC's B channel group facilities to the Empire State Building and allowing TVC to serve all of its receive sites using the B group channels.<sup>29</sup> NY3G also claims that its proposal to provide two-way, mobile broadband services "is the most productive and valued use of the spectrum."<sup>30</sup>

10. TVC responds that NY3G's petition is unauthorized because "the Commission does not recognize petitions for revocation filed by third parties."<sup>31</sup> TVC also describes the Petition as "grossly out of time" because the facts NY3G relies upon were known to the Commission when the original license for Station KNZ70 was issued in 1968.<sup>32</sup> TVC also claims that the grants of the Station KNZ70 and KVS31 licenses were consistent with the Commission's interpretation of the rule as allowing multiple channel groups as part of an integrated relay system.<sup>33</sup> TVC also argues that revoking TVC's F-channel group licenses "would have the immediate and devastating effect of depriving the children in some 106 schools served by those stations of the daily instructional programming they now receive."<sup>34</sup>

11. On April 27, 2006, the Commission released the *BRS/EBS Second Report and Order*.<sup>35</sup> Therein, the Commission made certain decisions regarding the status of grandfathered E&F channel EBS licensees. Specifically, in cases where the service area of the grandfathered EBS and co-channel BRS licensee has resulted in an overlap greater than 50%, the Commission established a ninety-day mandatory negotiation period where both BRS and EBS licensees are charged with an explicit duty to work to accommodate each other's communications requirements.<sup>36</sup> If, at the end of ninety days, such parties cannot reach a mutual agreement, the Commission will then employ a methodology known as "splitting the football" to resolve the dispute.<sup>37</sup> In reaching this decision, the Commission concluded that BRS and co-channel grandfathered EBS licensees have had two decades to negotiate a solution to any existing overlap problems, and thus sought to generate finality to such negotiations.<sup>38</sup> The Commission also

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<sup>27</sup> Petition at 10.

<sup>28</sup> Petition at 10.

<sup>29</sup> Petition at 11-13.

<sup>30</sup> Petition at 13.

<sup>31</sup> TVC Opposition at 6.

<sup>32</sup> TVC Opposition at 6.

<sup>33</sup> TVC Opposition at 6-10, *citing* Daytona Beach Community College, *Memorandum Opinion and Order*, 3 FCC Rcd 1951 (1988).

<sup>34</sup> TVC Opposition at 12.

<sup>35</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66, *et al.*, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, 21 FCC Rcd 5606 (2006) (*BRS Second Report and Order*).

<sup>36</sup> *BRS Second Report and Order*, 21 FCC Rcd at 5750 ¶ 350.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

eliminated the four-channel rule because “the four-channel rule may unduly limit the ability of educational institutions to take full advantage of the potential of EBS.”<sup>39</sup>

### III. DISCUSSION

12. Initially, we agree with TVC that although it is styled as a Petition to Modify, NY3G’s request, which seeks to prohibit TVC’s F group channel operations, is actually a request to revoke TVC’s F group channel authorizations. When a license is revoked, a licensee is completely barred from operating on the frequencies in question.<sup>40</sup> Thus, regardless of whether TVC’s F group operations can be relocated to its B group channels without any change in service, prohibiting TVC from operating on its F group channels amounts to a complete revocation of such licenses. Therefore, we conclude that NY3G’s Petition is a request for revocation of TVC’s F channel licenses.

13. Section 312 of the Communications Act provides the Commission with the discretion to institute revocation proceedings on its own motion. That provision does not specifically create rights in third parties to file petitions to revoke licenses or permits.<sup>41</sup> Nonetheless, the Commission has traditionally acted on such petitions by treating them as informal requests for Commission action pursuant to Section 1.41 of the Commission’s rules.<sup>42</sup> Therefore, we will treat NY3G’s Petition as an informal request and will consider its arguments in making our determination as to whether we should institute proceedings to revoke TVC’s F group licenses.

14. We conclude that there is no statutory basis pursuant to Section 312(a) upon which to institute revocation proceedings against TVC’s F group licenses. Section 312(a)(2) provides that the Commission may revoke any station license or construction permit for false statements in the application, for certain willful or repeated violations, or “because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application.”<sup>43</sup> NY3G does not allege, nor do we find any basis for commencing a revocation proceeding against TVC’s F channel licenses based on any false statements in TVC’s application or any willful or repeated rule violations after the grant of TVC’s license. The engineering statement attached to TVC’s application specifically mentions that authorizations for the F group channels were being sought to enhance TVC’s B channel operations.<sup>44</sup> Therefore, not only did TVC fully disclose the existence of its B group licenses in its F channel application, but also the circumstances were such that the Commission chose to grant TVC the additional authorizations even notwithstanding the existing B group authorizations.

15. NY3G contends that TVC’s use of the F channels is inefficient because TVC is simply utilizing such channels to re-broadcast programming from its B group operations and that NY3G is

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<sup>39</sup> *Id.*, 21 FCC Rcd at 5753 ¶ 358.

<sup>40</sup> See *In the Matter of Pacific Gas and Electric Company*, *Memorandum Opinion and Order*, 18 FCC Rcd 22761, 22765 ¶ 11 (2003).

<sup>41</sup> 47 U.S.C. § 312. See also *Manning Telecasting, Inc.*, File Nos. BMPCT-850328KF, BTCCT-850328KG, *Memorandum Opinion and Order*, 1986 WL 292657 (Feb. 14, 1986); *Conn-2 RSA Partnership*, *Memorandum Opinion and Order*, 9 FCC Rcd at 3298, n.7 (citing *City of Kerrville v. Dugosh Flying Service, Inc.*, *Memorandum Opinion and Order*, 99 FCC 2d 124, 126 (1984) and *Puerto Rican Media Action and Educational Council, Inc. v. Educational Broadcasting Corp.*, *Memorandum Opinion and Order*, 51 FCC 2d 1178 (1975)).

<sup>42</sup> 47 C.F.R. § 1.41. See *Conn-2 RSA Partnership*, 9 FCC Rcd at 3298 n.7.

<sup>43</sup> 47 U.S.C. § 312(a)(2).

<sup>44</sup> *Id.*

unable to deploy broadband services on these channels due to TVC's use.<sup>45</sup> Although equity doctrines may permit reopening a case to avoid a substantial injustice,<sup>46</sup> we find no such injustice here to NY3G. On the contrary, we agree with TVC that the continued operation of its F group channels serves the public interest, as the revocation of its licenses would have the immediate effect of depriving 106 schools and more than 18,000 students of the daily instructional programming they now receive.<sup>47</sup> We further agree with TVC that the Commission's grant of authority to TVC to utilize the F group channels was consistent with the Commission's objective of promoting the efficient use of spectrum and maximizing the use of frequencies for the transmission of educational programming to specified schools. While it is true that the Commission's goal in the nationwide reallocation of the F channels was to spur the development of BRS, the Commission was also driven by the fact that despite all its efforts to bolster educational usage, EBS simply did not thrive nationwide. The Commission never intended to disrupt the operations of EBS providers who were actively using the spectrum and balanced these goals by grandfathering existing operations. Indeed, we note that some EBS providers, such as TVC, have maintained continuous EBS operations for decades and have always been pioneers in the provision of educational programming notwithstanding the general lack of interest in the band. Because TVC has and continues to provide educational programming to a wide span of students, revoking TVC's licenses would be a substantial injustice to the educational community served by TVC. We further find that no substantial injustice would occur to NY3G here where no violations of the Commission's rules occurred, and, as discussed more fully below, where the Commission has recently acted to resolve the question of grandfathered E and F group EBS licensees in the context of the specific scenario presented herein.

16. Based upon NY3G's assertion that TVC's F channel licenses should have never been granted, the only possible theory upon which NY3G's assertions could be based is pursuant to the provision that permits revocation "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application." Section 312(a)(2) of the Act permits the revocation of a license because of newly discovered conditions coming to the attention of the Commission that would warrant a denial of an original application.<sup>48</sup> We conclude that the facts of the instant case do not fall within the purview of that provision. Specifically, as discussed above, the Commission was aware of TVC's B group licensing when it granted TVC its F group authorizations and apparently chose to waive application of that rule. At this juncture, it is important to note that during the time frame in which TVC received its F group authorizations, EBS spectrum was vastly underutilized. Indeed, it took the Commission years of promoting EBS, and numerous regulatory amendments designed to facilitate and accommodate use of the spectrum to generate interest in the band. For example, the Commission took numerous steps to relax the EBS leasing rules to encourage potential users to seek licenses and have their educational operations funded by leasing revenues. In a situation such as that set forth in TVC's application for the F group licenses—where a licensee that was actually conducting educational operations on this underutilized spectrum was in need of more channels to augment its operations and provide transmissions to additional educational institutions—it would be entirely consistent with the Commission's agenda to promote EBS usage for the Commission to have granted TVC the F group licenses and waived the four channel rule on its own motion. Therefore, the requirements to revoke a license pursuant to Section 312 wherein conditions come to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application do not exist here. Indeed, the circumstances surrounding TVC's application support a grant of these licenses

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<sup>45</sup> *Id.* at 9-10.

<sup>46</sup> See *Pacific Gas and Electric Company*, 18 FCC Rcd at 22764 ¶ 9.

<sup>47</sup> TVC Reply Comments at 10.

<sup>48</sup> *Id.*

by the Commission. Therefore, we conclude that there is no basis to institute revocation proceedings against TVC's F group licenses at this time.

17. To the extent that there is inefficient use of spectrum, we believe that the Commission's recent adoption of a uniform mechanism for resolving major overlaps of grandfathered E&F channel EBS licensees vis-à-vis their co-channel BRS counterparts will give both TVC and NY3G significant opportunities to enhance their use of the spectrum. TVC's grandfathered E and F channel EBS operations were frozen for 23 years.<sup>49</sup> In reaching its decision, the Commission carefully contemplated the three scenarios nationwide that its EBS grandfathering and subsequent co-channel BRS assignment decisions had created. With this in mind, the Commission carefully designed a solution to each scenario, and specifically contemplated the existing controversy between TVC and NY3G.<sup>50</sup>

#### IV. CONCLUSION AND ORDERING CLAUSES

18. We conclude that NY3G's Petition to Modify is actually a request to revoke TVC's F Group channel authorizations. Because Section 312 of the Act, which governs revocation proceedings, does not create rights in third parties to file petitions to revoke licenses, we treat NY3G's Petition as an informal request for Commission action pursuant to Section 1.41 of the Commission's Rules. We decline, however, to initiate revocation proceedings against TVC because the Commission's action granting TVC its F group channel authorizations over 30 years ago is administratively final and may not be disturbed. Moreover, we conclude that equity doctrines do not justify reopening this case to avoid a substantial injustice. We also conclude that there is no statutory basis upon which to institute revocation proceedings against TVC.

19. Accordingly, IT IS ORDERED that, pursuant to Section 312 of the Act, 47 U.S.C. § 312, and Section 1.41 of the Commission's Rules, 47 C.F.R. §§ 1.41, the Petition to Modify the interrelated EBS authorizations of Trans Video Communications, Inc., for its B and F group facilities in New York City filed by NY3G Partnership on January 10, 2005 IS DENIED.

20. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble  
Deputy Chief, Broadband Division  
Wireless Telecommunications Bureau

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<sup>49</sup> *BRS Second Report and Order*, 21 FCC Rcd at 5750 ¶ 350.

<sup>50</sup> *Id.* at ¶¶ 351, 353.